

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Amendment of Parts 1, 21, 73, 74 and 101 of the)	WT Docket No. 03-66
Commission's Rules to Facilitate the Provision of)	RM-10586
Fixed and Mobile Broadband Access, Educational)	
and Other Advanced Services in the 2150-2162)	
and 2500-2690 MHz Bands)	
)	
Part 1 of the Commission's Rules – Further)	WT Docket No. 03-67
Competitive Bidding Procedures)	
)	
Amendment of Parts 21 and 74 to Enable)	MM Docket No. 97-217
Multipoint Distribution Service and the)	
Instructional Television Fixed Service)	
to Engage in Fixed Two-Way Transmissions)	
)	
Amendment of Parts 21 and 74 of the)	WT Docket No. 02-68
Commission's Rules with Regard to Licensing)	RM-9178
in the Multipoint Distribution Service and in the)	
Instructional Television Fixed Service for the)	
Gulf of Mexico)	
)	
Promoting Efficient Use of Spectrum Through)	WT Docket No. 00-230
Elimination of Barriers to the Development of)	
Secondary Markets)	

To: The Commission

**Consolidated Opposition to Petitions for Reconsideration of
Luxon Wireless Inc.**

Luxon Wireless Inc. ("Luxon") hereby opposes certain petitions for reconsideration filed in this proceeding,¹ and also urges the Commission to adopt certain proposals on reconsideration that would further the Commission's goals of expediting the provision of advanced wireless services to the public. Specifically, Luxon asks the Commission to:

¹ See Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 04-135, 19 FCC Rcd 14165 (2004) ("BRS/EBS Order"). The Further Notice of Proposed Rulemaking portion of the document will be referred to as the "FNPRM."

- Reject several proposals that would require the Commission to unnecessarily increase its oversight of Educational Broadband Service (“EBS”) spectrum leases;
- Reject proposals to freeze pre-transition two-way deployments of Broadband Radio Service (“BRS”) and EBS, and ensure that any procedures adopted to identify and remedy interference from pre-transition two-way operations be reasonable, narrowly tailored and sufficient to promote collaborative efforts to remedy harmful interference;
- Reconsider the decision to designate Major Economic Areas (“MEAs”) as the areas proponents must transition, and instead adopt Basic Trading Areas (“BTAs”) as the baseline transition areas; and
- Reconsider its decision permitting unlicensed operations in the 2655-2690 MHz band.

Background

Luxon was established in 2003 to deploy and commercially operate high-quality, carrier-grade wireless broadband services in the state of Florida and other areas. As a “true start-up” enterprise, Luxon focuses on serving residences and commercial businesses that are underserved or unserved by wired solutions such as DSL or cable modem. Luxon has obtained spectrum rights in five contiguous markets in the Florida panhandle through leasing arrangements with EBS licensees, and is dedicated to working with educational institutions to develop and provide advanced services such as video-on-demand and campus-wide intranets.

Luxon commends the extensive efforts of the Commission, the private sector, the education community and others to create a new, comprehensive regulatory structure that will enhance the flexibility and the value of the 2.5 GHz band and accelerate service deployments. Luxon supports many of the rule changes adopted in the *BRS/EBS Order*, but is concerned that certain proposals raised on reconsideration would undo many of the advances intended by the Commission and would unduly restrict new operations. As discussed below, Luxon urges the Commission to reject certain of these proposals and adopt others.

Discussion

I. The Commission Should Reject Proposed Changes to the EBS Spectrum Leasing Rules.

Luxon strongly opposes the proposals of IMWED² and CTN/NIA³ to restructure the rules governing EBS leases. If adopted, these changes would contravene the Commission's recent decisions promoting flexibility and market-based transactions,⁴ and instead require the Commission to unnecessarily expend administrative resources to supervise individual EBS leasing relationships.⁵

Minimum Educational Reservation

The Commission should reject IMWED's proposal to increase the amount of available recapture time above the existing five percent minimum. To support an arbitrary five-fold increase, IMWED points to a "licensee's possible mistake in locking up spectrum for 15 years under a contract that designates a maximum of 5% of capacity, despite a growing need for more."⁶ In other words, IMWED wants the minimum reservation increased because, it believes, EBS licensees may not be able to bargain effectively for their future spectrum and service needs.

There is no evidence to support IMWED's conjecture. In the *Two-Way Order*, the Commission rejected an industry compromise and justified its decision to adopt a five percent minimum by stating that "it is not a simple matter to arrive at a 'one size fits all' approach towards minimum ITFS educational usage requirements and reservation of spectrum solely for

² See Petition for Reconsideration of The ITFS/2.5 GHz Mobile Wireless Engineering & Development Alliance, Inc. filed January 10, 2005 ("IMWED Petition"). IMWED would grandfather existing lease terms that are at odds with its proposals.

³ See Petition for Reconsideration of the Catholic Television Network and the National ITFS Association filed January 10, 2005 ("CTN/NIA Petition").

⁴ See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 00-230, 18 FCC Red 20604 (2003) ("*Secondary Markets Order*").

⁵ Luxon supports CTN/NIA in seeking clarification of the *BRS/EBS Order* to make clear that EBS licensees may enter into *de facto* spectrum transfer leases. See CTN/NIA Petition at 20-21.

⁶ IMWED Petition at 9.

instructional purposes, whether immediate or future.”⁷ Having recently negotiated a number of EBS leases, Luxon has great faith that EBS licensees understand the value of their spectrum, can project their spectrum and service needs, and negotiate leases on an even playing field. In its agreements, Luxon has accommodated the needs of EBS licensees that have different educational goals and different spectrum requirements, manifesting the Commission’s view that its existing leasing rules “best promote this flexibility while at the same time safeguarding the primary educational purpose of the ITFS spectrum allocation.”⁸ The rationale behind the Commission’s 1998 decision to establish a five percent minimum thus would appear to be more true today.

Luxon also opposes IMWED’s proposal to measure the educational reservation according “to overall system data throughput at all times in all locations” or by “full-day measured system throughput, with data transmitted at such locations and times as the EBS licensee specifies in its discretion.”⁹ As the Commission acknowledged in refusing to define the minimum reservation in 1998, this approach is unnecessary and would limit the ability of operators and licensees to craft flexible market-specific solutions to meet their own capacity needs.¹⁰ While IMWED faults the Commission for providing “little guidance as to how this rubric is to be applied in practice,” it ignores the Commission’s clear pronouncement that capacity is “difficult to measure in light of the varied forms that such usage can take” and that the Commission would “rely on the good faith efforts of ITFS licensees to meet the requirements set forth [in the rules].”¹¹ For these reasons, IMWED’s proposal must be rejected.

⁷ Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, 13 FCC Rcd 19112, 19159 (1998) (“*Two-Way Order*”) (footnote omitted).

⁸ *Id.*

⁹ IMWED Petition at 7.

¹⁰ See *Two-Way Order* at 19162.

¹¹ *Id.*

Rights of First Refusal

The Commission also should reject IMWED's proposal to prevent an EBS lessee from granting its spectrum lessee a right of first refusal to acquire the EBS license, contingent on the Commission changing its rules to permit commercial entities to hold EBS licenses. The effect of this blanket restriction would reduce an EBS licensee's bargaining options and eliminate an operator's ability to preserve the long-term value of its investment in the EBS spectrum, despite the fact that an EBS licensee would receive additional consideration in exchange for this provision. Simply put, if the Commission were ever to permit commercial entities to hold EBS licenses, a spectrum lessee without a first refusal right would have limited means to ensure continued use of spectrum in which it has made substantial investment. Moreover, a licensee is not required to offer its lessee a right of first refusal; instead, it is free to negotiate an alternative arrangement. If adopted, IMWED's proposal would limit flexibility for those EBS licensees it purports to protect by requiring the Commission to needlessly interfere with their private leasing arrangements.

EBS Lease Term Limits

The Commission should reject CTN/NIA's proposal to re-establish a 15-year limit on the length of EBS leases.¹² Reinstatement of this restriction would be inconsistent with rules adopted in the secondary markets proceeding, which afford licensees maximum flexibility by not imposing any term limit whatsoever, and are designed to encourage spectrum usage.¹³ Without a cap, EBS licensees and lessees could enter into longer leases, giving the EBS licensee long-term security and the lessee increased ability to attract investment. These benefits were cited in the Commission's 1998 decision to increase the cap from 10 to 15 years, and would apply with even

¹² See CTN/NIA Petition at 20.

¹³ See generally *Secondary Markets Order*.

greater force if no artificial limit were imposed.¹⁴ Here, too, the “one size fits all” approach does not work.

CTN/NIA also cannot reasonably argue that a cap on lease terms is a “substantive use requirement,” as the *BRS/EBS Order* ambiguously suggests.¹⁵ To be sure, a limit on lease terms has no relationship to educational use of EBS channels. The best policy for the Commission to follow would be to have no limit on the length of EBS lease terms.

Submission of EBS Leases

The Commission should reject IMWED’s proposal that would require an EBS licensee to submit unredacted copies of its lease to the Commission.¹⁶ This request is at odds with the secondary market rules requiring lessors and lessees to certify compliance with numerous rules prior to commencing spectrum leasing activities, with spectrum leases provided to the Commission only upon request.¹⁷ Clearly, IMWED’s proposal is antithetical to the Commission’s efforts to streamline the spectrum leasing process.

II. The Commission Should Adopt Reasonable Procedures for Pre-Transition Interference Resolution.

Luxon is poised to begin offering two-way service in the near future. Yet CTN/NIA and IMWED seek to delay the deployment of new services by asking the Commission to prohibit two-way use of the BRS/EBS band prior to transition.¹⁸ These requests must be rejected.

IMWED’s request is based on its mistaken belief that “rational economic actors” would launch sporadic low-power operations to “avoid” the high cost of becoming proponents.¹⁹ To the contrary, permitting operators and licensees to launch pre-transition two-way services would

¹⁴ See *Two-Way Order* at 19183.

¹⁵ See *BRS/EBS Order* at ¶181.

¹⁶ See IMWED Petition at 10-11.

¹⁷ See *Secondary Markets Order* at 20660.

¹⁸ See CTN/NIA Petition at 13; IMWED Petition at 6.

¹⁹ See IMWED Petition at 6.

not affect their incentive to transition their markets because, under the new rules, transitions must be initiated by a specific deadline, after which time licensees in non-transitioned markets may be forced to forfeit their spectrum.²⁰ In addition, a BRS operator cannot “avoid” the cost of becoming a proponent by launching pre-transition operations but must share in that cost on a *pro rata* basis.²¹ Moreover, a licensee that does not provide “substantial service” also could lose its license.²² Suffice to say, there is no basis for IMWED’s speculative claim.

The Commission also should reject CTN/NIA’s argument that pre-transition two-way operations should be prohibited because of the potential for interference from interleaved low-power and high-power operations.²³ As CTN/NIA apparently acknowledge, there is a less restrictive way to manage the interference threat, and they promote a general plan under which EBS licensees and two-way operators would cooperate in attempting to determine the source of any harmful interference and take steps to remedy the interference.

The broad parameters of this plan have merit, but Luxon believes that it can be improved by encouraging parties to communicate prior to launch and by more precisely defining the circumstances that would require remediation. With increased cooperation and a more precise definition of interference focused on the practical impact pre-transition operations would have on EBS operations, Luxon is confident that there would be few, if any, unresolvable situations. Under no circumstances, however, should operators be required to terminate service, the threat of which would place commercial operators in secondary status.

²⁰ See *FNPRM* at ¶¶264-269.

²¹ Section 27.1233(c) mitigates potential “free-rider” problems by providing that “BRS licensees in the LBS or UBS must reimburse the proponent(s) a pro rata share of the cost of transitioning the facilities they use to provide commercial service, either directly or through a lease agreement with an EBS licensee.”

²² See *FNPRM* at ¶321.

²³ See CTN/NIA Petition at 11-14.

III. The FCC Should Use BTAs, not MEAs, as Transition Areas.

Luxon agrees with numerous petitioners²⁴ that the Commission should reconsider its decision requiring proponents to transition BRS and EBS licensees in their MEAs, and agrees that the more appropriate transition areas are BTAs. MEAs are simply too large for effective transitions and many commercial operators, especially new entrants, will be unable to pay for the costs of transitioning such large areas. The Commission's decision would be a financial disincentive to entrepreneurs that otherwise would seek to transition their local markets, and also would require a proponent to coordinate with competitors within that MEA, even if the markets bear no reasonable economic relationship to the proponent's operations or would face no risk of interference from those operations. For example, if Luxon wished to serve as a transition proponent in the Fort Walton Beach market, Luxon would be forced to transition numerous unrelated markets throughout MEA 27, including markets in Alabama, Florida, Louisiana and Mississippi that present no reasonable threat of interference if they were to be transitioned at different times.

Using BTAs as the transition areas will promote the Commission's goal of facilitating an expeditious nationwide transition to the new band plan. BTAs are much smaller than MEAs, and it will be much less costly and less complicated to transition according to BTAs that generally conform to existing systems. The Commission should reconsider its decision to use MEAs as the basis for transition areas and instead adopt BTAs.

²⁴ See, e.g., Petition for Partial Reconsideration of the Wireless Communications Association International, Inc. filed January 10, 2005 at 3-12 (corrected version filed January 18, 2005); CTN/NIA Petition at 4; Petition for Reconsideration of C&W Enterprises, Inc. filed January 10, 2005 at 2-4; Petition for Reconsideration of Hispanic Information and Telecommunications Network filed January 10, 2005 at 2-4; IMWED Petition at 3-5; Petition for Partial Reconsideration of Nextel Communications filed January 10, 2005 at 2-8; Petition for Partial Reconsideration of Plateau Telecommunications, Inc. filed January 10, 2005 at 4-10; and Sprint Petition for Reconsideration filed January 10, 2005 at 2-4.

IV. The FCC Should Reconsider Its Decision to Allow Unlicensed Operations in the 2655-2690 MHz Band.

The Commission on reconsideration should reverse its decision to permit low-power unlicensed devices to operate in the 2655-2690 MHz band. Given its efforts to deploy high-quality wireless broadband services, Luxon has a strong interest in seeing that its network and business operations are not compromised by a regulatory environment that could strip licensees of one of their greatest benefits – exclusive use. Permitting unlicensed devices to operate in licensed bands would undermine a licensee’s ability to use its spectrum flexibly, would be premature in the absence of comprehensive testing, would harm investment in advanced services and would chill innovation.

EBS, BRS and other licensees have obtained exclusive rights to spectrum through their licenses. In addition to interference protection rights, these rights include the ability of licensees to partition portions of their geographic service area, disaggregate spectrum, lease spectrum to third parties, superchannelize by aggregating spectrum pieces, and subchannelize by dividing spectrum into portions that are less than the authorized bandwidth. Moreover, the Commission’s encouragement of secondary markets as an engine for flexible use gives licensees rights to contract with other parties to put the spectrum to its most valued use. By definition, this contractual right must include the licensee’s right to lease or otherwise permit operation on all dimensions of its spectrum – frequency, power, time and geographic area.²⁵

A far better solution would be to allow the market to function as the Commission intends by requiring prospective operators of unlicensed devices to negotiate with incumbent licensees to obtain access to spectrum that would operate in the licensee’s authorized service area. This way, the market, not the government, would set the terms of spectrum use, and licensees and spectrum

²⁵ See *Spectrum Policy Task Force Report*, released November 15, 2002 at 19-21.

users could mutually agree on a market-by-market basis on how to use the spectrum. Licensees also could negotiate their own remedies and enforcement methods so that the Commission would not need to be as actively involved in resolving interference issues. In bands such as BRS and EBS that are heavily used, a flexible use model remains the most appropriate one to advance spectrum policy.

Conclusion

In light of the foregoing, Luxon Wireless Inc. urges the Commission to reject several proposals that would require the Commission to unnecessarily intrude upon private contractual arrangements and reject proposals that would prohibit or limit pre-transition two-way EBS and BRS operations. The Commission should reconsider its decisions to designate MEAs, rather than BTAs, as the size of transition areas and to permit unlicensed operations in the 2655-2690 MHz band.

Respectfully submitted,

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February 22, 2005

Certificate of Service

I, Kenneth Wolin, Legal Assistant at the firm of Rini Coran, PC, do certify that I have caused a copy of the foregoing Consolidated Opposition to be sent First Class United States mail, postage prepaid to the following parties:

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